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IN THE

Supreme Court of the United States

October Term, 1966
No. 1377

LOUIS EUGENE SUDDUTH,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

STATEMENT.

Petitioner was charged by the People of the State of California in a verified complaint filed in the Municipal Court of the Los Angeles Judicial District with a violation of Section 23102(a),[1] of the Vehicle Code of the State of California, a misdemeanor.

He was duly arraigned, informed of the charge against him and of his legal rights, entered a plea of not guilty and demanded a jury trial.

Petitioner was convicted of violating Vehicle Code Section 23102(a). He appealed to the Appellate Department of the Superior Court for the County of Los Angeles, which court affirmed the judgment of convic-

[1] "It is unlawful for any person who is under the influence of intoxicating liquor, or under the combined influence of intoxicating liquor and any drug, to drive a vehicle upon any highway."

tion with an unreported written opinion on December 21, 1965. The California Court of Appeal affirmed the judgment of conviction with a written opinion on July 13, 1966. (52 Cal. Rptr. 527.) The California Supreme Court affirmed the judgment of conviction with a written opinion on December 23, 1966. (65 A.C. 585; 55 Cal. Rptr. 393; 421 P. 2d 401.) A Petition for Rehearing was denied on January 19, 1967.

FACTS.

On March 17, 1965, at 2:10 A.M. the petitioner was observed making a right turn from the lane next to the double yellow lines. [R. T. p. 7.] Before making the right turn, during the turn and after the turn had been completed, the petitioner's vehicle was 20 feet from the righthand curb. [R. T. p. 8.] Los Angeles police officers stopped the petitioner's vehicle.

As the police officer got out of his vehicle, the petitioner stepped from his vehicle and approached the officer. The officer noted that the petitioner was very unsteady on his feet, swaying to and fro. [R. T. p. 10.]

Petitioner was asked for his driver's license and after fumbling through his wallet for thirty seconds gave the officer a department store credit card. [R. T. p. 10.] About two minutes later he produced his driver's license. [R. T. p. 11.] A strong odor of an alcoholic beverage was noted on petitioner's breath [R. T. p. 11]; his eyes were bloodshot and glassy and had a slow reaction to light [R. T. p. 33]; his speech was slow and thick. [R. T. p. 18.] The officer formed the opinion the petitioner was drunk. [R. T. p. 20.]

The officer informed the petitioner that he had the right to an attorney, that he had the right to remain si-

lent and that anything he said could be used against him in any subsequent criminal proceeding. [R. T. p. 11.]

The walk-the-line phase of the Field Sobriety Examination was explained to the petitioner and he stated "I'm not going to take your test." [R. T. p. 11.] When asked if he had had anything to drink, petitioner at first replied, "Nothing," then he said he had had "two beers," then he said he had had "Nothing." [R. T. p. 14.] Petitioner was arrested. [R. T. p. 18.]

At the police station a Breathalyzer Examination was assembled and explained to the petitioner. Petitioner refused the test. [R. T. p. 18.]

ISSUES PRESENTED.

I.

Petitioner Had No Right to Decline a Blood-Alcohol Test.

A suspect has no constitutional right to refuse a test designed to produce evidence in the form of a breath sample whether or not counsel is present.

Schmerber v. California (1966), 384 U.S. 751, 16 L.Ed. 2d 908.

People v. Sudduth (1966), 65 A.C. 585, 55 Cal. Rptr. 393, 421 P. 2d 401.

Petitioner, arrested for driving a motor vehicle while under the influence of intoxicating liquor, was offered a Breathalyzer test which would determine the amount of alcohol in the blood. A blood-alcohol test protects one who has the odor of alcohol on his breath, but has not been drinking to excess and one whose conduct may create the appearance of intoxication when he is suffering from some physical condition over which he has no

control. A blood-alcohol test may serve to exonerate as well as convict. (*In re McDonald* (1967), 249 A.C.A. 1079, 1082, 58 Cal. Rptr. 29; *Breithaupt v. Abram* (1957), 352 U.S. 432, 439, 1 L.Ed. 2d 448, 453).

Petitioner refused to take a Breathalyzer test. The breath method of determining the amount of alcohol in the blood has the advantage of prompt and easy administration by non-medically trained personnel and with relatively inexpensive equipment. The Drunkometer (*People v. Kovacik* (1954), 128 N.Y.S. 2d 492, 205 Misc. 275), the Intoximeter (*People v. Sykes* (1965), 238 Cal. App. 2d 156, 47 Cal. Rptr. 596) and the Breathalyzer are some of the devices that "are now generally scientifically recognized as sufficiently reliable." (*State v. Johnson* (1964), 42 N.J. 146, 199 A. 2d 809, 822).

Courts should favor the adoption of scientific methods of crime detection where the demonstrated accuracy and reliability has become established and recognized. Breathalyzer test results have been accepted as scientifically reliable. (*State v. Rodell* (1962), 17 Wis. 2d 451, 117 N.W. 2d 278; *People v. Stringfield* (1962), 37 Ill. App. 2d 344, 185 N.E. 2d 381; *Pruitt v. State* (1965), 393 S.W. 2d 747; *City of Bremerton v. Osborne* (1965), 66 Wash. 2d 281, 401 P. 2d 973; *State v. Powell* (1965), 264 N.C. 73, 140 S.E. 2d 705; *Penny v. State* (1966), Okl. Cr., 410 P. 2d 553).

A state may constitutionally require the taking of a blood-alcohol test as a pre-requisite to the privilege of using the roads. (*Walton v. City of Roanoke* (1963), 204 Va. 678, 133 S.E. 2d 315; *Lee v. State* (1961), 187 Kan. 566, 358 P. 2d 765; *State v. Bock* (1958), 80 Idaho 296, 328 P. 2d 1065; *Prucha v. Dept. of Motor*

Vehicles (1961), 172 Neb. 415, 110 N.W. 2d 75; *Breithaupt, supra,* footnote 2).

Eighteen States have enacted so-called "implied consent" laws. The California Legislature approved of the *breath* method of determining the amount of alcohol in the blood when it enacted California Vehicle Code Section 13353 which went into effect on October 6, 1966.

> "Any person who drives a motor vehicle upon a highway shall be deemed to have given his consent to a chemical test of his blood, *breath* or urine for the purpose of determining the alcoholic content of his blood. . . . The person arrested shall have the choice of whether the test shall be of his blood, *breath* or urine. . . ."
>
> California Vehicle Code Section 13353.

The efficacy of a blood alcohol test depends upon it being made as soon as possible after the time of the offense. The intoxicating effect of alcohol diminishes with the passage of time. (*Schmerber v. California, supra* (1966), 384 U.S. 757, 16 L.Ed. 2d 908, 920).

The scientific validity of blood-alcohol tests, when properly administered, is generally conceded. (*People v. Duroncelay* (1957), 48 Cal. 2d 766, 772, 312 P. 2d 690). The test itself does not declare guilt nor innocence, nor the fact of intoxication, which still is to be determined by the testimony of experts interpreting the test. (*People v. Conterno* (1959), 170 Cal. App. 2d Supp. 817, 824-825, 339 P. 2d 968). At the trial the defendant is allowed to cross-examine the individuals who administered the test and the expert who interprets the results of the test. (See: *Schmerber v. California, supra,* Transcript of Record, pp. 124-140, testimony of Geraldine

Lambert.) With the right to cross-examine the prosecution's witnesses as to the accuracy of the machine and to the qualifications of the individual administering the test, the petitioner's Sixth Amendment rights are not violated.

Petitioner claims that his right to counsel was violated because the Breathalyzer test was offered in the absence of petitioner's counsel. This theory was rejected in *Schmerber, supra,* when this court held that "since petitioner was not entitled to assert the privilege," he would have had no greater right if counsel had been present.

If this court were to apply petitioner's theory to crime investigation, then police could not take pictures of the scene of a crime, or take fingerprints from the premises, plaster molds of tire marks, or shoe imprints without the presence of the accused's counsel. The right to counsel should not be invoked to block scientific crime investigation. To preclude the police from using scientific crime detection would foster reliance instead on the very inquisitorial methods of law enforcement which this court has repeatedly found suspect.

Respondent contends that the petitioner had no constitutional right to decline the Breathalyzer test. In a day when excessive loss of life and property is caused by inebriated drivers, an imperative need exists for a fair, efficient and accurate system of detection, enforcement and, hence, prevention.

II.

Admission in Evidence of Petitioner's Refusal to Take the Breathalyzer Test Was Not a Violation of the Fifth, Sixth or Fourteenth Amendments to the Constitution of the United States.

Petitioner's refusal to take the Breathalyzer test was admitted in evidence as a "consciousness of guilt." Conduct indicating consciousness of guilt is not a testimonial statement of guilt and, therefore, is not protected by the privilege against self-incrimination. By acting like a guilty person a man does not testify to his guilt, but merely exposes himself to the drawing of inferences from circumstantial evidence of his state of mind. (*People v. Ellis* (1966), 65 A.C. 571, 579, 55 Cal. Rptr. 385, 421 P. 2d 393.)

The privilege against self-incrimination applies to evidence of "communications or testimony" of the accused, but not to "real or physical" evidence derived from him. (*Schmerber, supra*). The result of a Breathalyzer test falls within the category of real or physical evidence. (*People v. Bustos* (1966) 247 A.C.A. 429, 431, 55 Cal. Rptr. 603). Petitioner's refusal itself was not testimonial communication. It was circumstantial evidence of a consciousness of guilt.

The refusal to take the Breathalyzer test has the same probative value as does testimony that an accused attempted to fabricate an alibi (*People v. Allison* (1966), 245 A.C.A. 590, 598, 54 Cal. Rptr. 148), escape from custody (*People v. Otis* (1959), 174 Cal. App. 2d 119, 129, 344 P. 2d 342), fled the state because

he knew police were looking for him (*People v. Brooks* (1966), 64 Cal. 2d 130, 138, 48 Cal. Rptr. 379, 410 P. 2d 383) or attempted to have evidence against him retracted by a witness (*People v. Burton* (1961), 55 Cal. 2d 328, 347, 11 Cal. Rptr. 65, 359 P. 2d 433).

Acts of an accused designed to escape arrest, trial or conviction afford an inference of consciousness of guilt and are receivable against him as implied or tacit admissions. (*People v. Zavala* (1966), 239 Cal. App. 2d 732, 740, 49 Cal. Rptr. 129.) The admission into evidence of the petitioner's refusal to take the Breathalyzer test was not a violation of the privilege against self-incrimination. (*City of Dayton v. Allen* (1959), 200 N.E. 2d 356, 366; *State v. Durrant* (1963), 188 A. 2d 526; *State v. Smith* (1956), 230 S.C. 164, 94 S.E. 2d 886, 890; *State v. Benson* (1941), 230 Iowa 1168, 300 N.W. 275; *Gardner v. Commonwealth* (1954), 195 Va. 845, 81 S.E. 2d 614; *State v. Bock, supra* (1958), 80 Idaho 296, 328 P. 2d 1065, 1073.)

Evidence of the refusal is not only probative; its admission operates to induce suspects to cooperate with law enforcement officials. Only the overriding interest in protecting the privilege against compulsory self-incrimination, itself the result of a delicate balance, prohibits evidence or comment in the refusal to testify cases. But the privilege itself is not at issue here. Without exception, none of the reasons that support the privilege lends support to a rule that would exclude probative evidence obtained from an accused's effort to conceal non-privileged evidence.

A wrongful refusal to cooperate with law enforcement officers does not qualify for the protection that prohibits comment on a defendant's failure to testify at trial. (*Griffin v. California* (1965), 380 U.S. 609, 14 L. Ed. 2d 106.) Evidence of petitioner's refusal to take Breathalyzer test was not a violation of the Fifth Amendment privilege against self-incrimination.

Evidence of the refusal to give a breath sample is not a violation of the Sixth Amendment right to counsel. This right established in *Escobedo v. Illinois* (1964), 378 U.S. 478, 12 L. Ed. 2d 977 and *Miranda v. Arizona* (1966), 384 U.S. 436, 16 L. Ed. 2d 694 is designed to prevent the rise of coercive practices to extort confessions or other incriminating statements. There is no support in *Escobedo* or *Miranda* for invoking the right to counsel to block scientific crime investigation. (*People v. Graves* (1966), 64 Cal. 2d 208, 211, 49 Cal. Rptr. 386, 411 P. 2d 114; cert. denied, 385 U.S. 883, 17 L. Ed. 2d 111.)

Petitioner's refusal was properly admitted in evidence. This evidence was not a denial of the rights guaranteed by the Fifth, Sixth or Fourteenth Amendments of the United States Constitution. (*People v. Ellis, supra; People v. Sudduth, supra.*) The refusal to take the Breathalyzer test which operates to suppress evidence of intoxication, which disappears rapidly with the passage of time, should not be encouraged as a device to escape prosecution.

CONCLUSION.

The petition for Writ of Certiorari does not disclose that there has been a violation of petitioner's rights under the federal Constitution, nor does it show that the highest court of the State of California has decided a federal question in conflict with applicable decisions of this court, or decided a federal question of substance not theretofore determined by this court.

It is urged that the petition be denied.

Respectfully submitted,

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